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ABSTRACT

In discussing the recent legislative influences on the identification and placement of children in programs for the mentally handicapped, the author presents a brief overview of the development of the concept of special education as indicated by significant court rulings of the late nineteenth and early twentieth centuries. Major legal decisions of the past decade are described relating to areas of state definitions of disability and eligibility, validity of placement (with particular emphasis on intelligence testing as a primary criterion), discriminatory placement of minority groups, parent rights, and ability grouping or tracking. The author also summarizes the implications of the cited cases in terms of testing, placement procedures, individual rights, and the trend of special education itself. (RD)

# Recent Influences of Law on the Identification and Placement of Children in Programs for the Mentally Retarded

Frederick J. Weintraub

# Recent Influences of Law on the Identification and Placement of Children in Programs for the Mentally Retarded

Special education, as an institution of the American educational enterprise, has had a proud history of being that one element of the enterprise that has truly focused on the unique learning needs of the handicapped children it has served. Law has been used by special educators and parents of handicapped children as a "sword of Damocles" to force the unwilling education enterprise to direct resources to the establishment of special programs for handicapped children (Weintraub, 1969).

However, it has only been recently that this "sword" has been found to have a second cutting edge. For in their zeal to provide for children, it has become apparant that in some cases the basic rights of these children have been violated. This realization has resulted in recent years in numerous court proceedings, corrective legislation, media condemnations, confrontations, and a general sense of bewilderment on the part of the special education community.

It is the purpose of this paper to review the development of the concept of special education, the major legal statutes and cases pertaining to this issue, and to consider some implications of these cases to testing and placement procedures.

The views expressed in this paper are solely those of the author and should not be construed to be those of The Council for Exceptional Children, although many of these views are expressed in policy statements currently under development by the Council.

Developmental Overview

While it is explicit in the U.S. Constitution that government is charged with promoting "the general welfare," such purpose has been inherent to all governments at all times, with varying perceptions of "the general welfare." The Greeks of Sparta placed their cripples on the mountainsides, and state governments, since the early 1800's, place the handicapped in institutions. Even today "the general welfare" is often construed to legally sanction coercive methods of protecting society from the deviant.

In 1919, the Supreme Court of Wisconsin ruled in Beattie v. State Board of Education (172 N.W. 153) that "the rights of a child of school age to attend the public schools of the state cannot be insisted upon, when his presence therein is harmful to the best interests of the school." The child in question was shown not to be a physical threat and could compete in the academic environment. The major argument presented by the school district for exclusion was that his physical condition (cerebral palsy) produced a "depressing and nauseating effect on the teachers and school children" and that he required an undue portion of the teacher's time and attention.

Historically, public education, as conceived by Horace Mann and its other founders and noted by Mann (1968), thought that "it would be enough to open the schools to everyone, to rich and poor alike, and then to let the youngsters make the most of their opportunities. It was assumed that in a free-for-all contest the prizes would go to those who has the most brains, industry, ambition, and character." The Georgia Populist, Tom Watson, expressed this philosophy most clearly:

> Close no entrance to the poorest, the weakest, the humblest. Say to ambition everywhere, 'the field is clear, the contest fair; come, and win your share if you can! (Woodward, 1938)

However, for many, this limited concept of equality of educational opportunity, coupled with the legal sanctions of cases such as Beattie v. State Board of Education, closed the educational door to those who could not compete in the fair race.

By the early 1900's, there developed a growing concern for these children.

> As families lost their economic production activities, they also began to lose their welfare functions, and the poor or ill or incapacitated became more nearly a community responsibility. Thus the training which a child received came to be of interest to all in the community, either as his potential employers or as his potential economic supports if he became dependent. (Coleman, 1968)

By 1910, educators were rethinking the competitive ethic.

> No longer can it be maintained that education at the public expense is to be directed solely to secure 'the survival of the fittest,' or even of the fit. One of the prime objectives of public education is to develop each child, fit or unfit, to his highest capacity, as far as conditions will permit, for the work and enjoyment of life. (New York City Department of Education, 1910)

While public school special education classes for the deaf got their impetus in the 1860's, the first public school class for the mentally retarded was established in 1896 in Providence, Rhode Island. By 1922, there were 191 public school programs for children with varying handicapping conditions in cities with populations over 100,000.

The major stimulus to this growth was an increasing base of state legislation requiring and/or providing financial incentive for the development of such programs. Legislation in New Jersey in 1911, New York in 1917, and Massachusetts in 1920, made it mandatory for local boards of education to determine the number of handicapped children within their school districts and, in the case of the mentally retarded, to provide special classes when there were 10 or more such children. Minnesota in 1915 provided state aid

in the amount of $100 for each child attending a special class, and also required that teachers hold special certificates (Weintraub, 1971).

By 1948, 1,500 school systems reported special education programs, 3,600 in 1958, and 5,600 in 1963. Mackie (1965) reported that as many as 8,000 school districts contracted for special education services from neighboring districts. Today it is estimated that 2,252,000 handicapped children are receiving special education services, 600,000 of whom are considered mentally retarded. Of all handicapped children receiving services (under Title VI, ESEA) about 25% are black, Mexican-American, Puerto Rican, or Indian.

Special education has become a major component of the educational enterprise. The last ten years have witnessed a sky-rocketing in state and federal legislation to support its growth. This progress has not been easy, for it has encountered resistance from the education establishment at every step of the way. This resistance is often reflected in a sense of paranoia on the part of special educators and parents of handicapped children. When you have to wage battle after battle, it is often difficult to view objectively or to accept questions about the sanctity of your quest.

There is very little question that the battles that have been fought have made it possible for many handicapped children to obtain an otherwise unavailable education, and to become self-fulfilled citizens. And more battles will have to be waged against a system that still fails to educate its children. The question that is being raised in the profession, the courts, the legislatures, and in the community is whether special education consciously or unconsciously in its goal to help children has denied some children of their basic rights.

The purpose of law is to preserve the rights of the people. When the people's rights are violated by government, no matter how altruistic its motives, then it is the responsibility of the people, through law, to force the government to retreat from its practice.

## Law and the Identification and Placement of Children in Special Education Programs for the Mentally Retarded

While there may be many social and professional issues related to the issue of identifying and placing children in special education programs for the mentally retarded, the existing body of law addresses itself to four major issues: 1) the acceptability of present standardized achievement tests as a criteria for special education placement for minority group children; 2) the liability of the tester; 3) the placement process; and 4) the grouping of children by ability.

1. All state education codes* contain a definition or enumeration of the types of handicapped children entitled to receive special educational services. The statutes vary greatly ranging from New York's broad statement,

> one who, because of mental, physical, or emotional reasons cannot be educated in regular classes, but can benefit by special services (Laws of New York, Article 89, Section 4401)

to New Mexico's disability enumerations,

> 'handicapped children' includes all persons of school age to twenty-one years of age inclusive who require special education in order to obtain the education of which they are capable because they are educably mentally handicapped, trainable mentally handicapped, blind, partially sighted, deaf, hard of hearing, speech defective, crippled or neurological and other health impaired or are emotionally maladjusted to the extent that they cannot make satisfactory progress in the regular school program (77-11-3)

to California's definition by disability approach,

> 'mentally retarded minors' means all minors who because of retarded intellectual development as determined by individual psychological examination are incapable of being educated efficiently and profitably through ordinary classroom instruction. (6901)

* Appreciation is extended to CEC's State-Federal Information Clearinghouse funded by the Bureau of Education for the Handicapped, U.S. Office of Education for researching the state statutes and regulations on this issue.

to Georgia's H.B. No. 453 highly specified definition by disability approach:

> Exceptional Children: are those who have emotional, physical, communicative, and/or intellectual deviations to the degree that there is interference with school achievements or adjustments, or prevention of full academic attainment, and who require modifications or alterations in their educational programs. This definition includes children who are mentally retarded, physically handicapped, speech handicapped, multiple handicapped, autistic, intellectually gifted, hearing impaired, visually impaired, and any other areas of exceptionality which may be identified.

State statutes proceed in similar varying fashion in specifying the procedures for certifying a child to be handicapped and placing such child in a special program. However, when statutes are combined with regulations, a general consistency can be observed among the states.

All states serve a classification of children generally referred to as "educable mentally retarded" or "educable mentally handicapped." The major criteria for certification is an intelligence quotient derived from an individual psychological test administered by a state-approved, certified or licensed psychologist or psychometrist. The most commonly recognized tests are the Stanford-Binet and the WISC. Other tests sometimes mentioned include the Bender Gestalt, the Draw-A-Person, and the Wide Range Achievement Test. The I.Q. limits usually begin at 50-55 and have a ceiling of 75-79. Many states require additional data for certifying a child to be educable mentally retarded. These often include physical examinations, social work case studies, and school counselor and teacher reports.

In the last several years, there have been four major cases directed at challenging the legality of placement of children in classes for the mentally retarded on the basis of an I.Q. tests which is prejudicial to the children in regard to native language,

cultural background and normative standardization. The most significant case to date is Diana v. State Board of Education (C-70 37 R F R).

In January, 1970, a suit was filed in the District Court of Northern California on behalf of nine Mexican-American students ranging in age from 8 to 13. The children came from homes where Spanish was the major if not the only language spoken. All had been placed in classes for the mentally retarded in Monterrey County, California. Their I.Q.'s ranged from 30 to 72 with a mean score of 63-1/2. They were retested bilingually and seven of the nine scored higher than the I.Q. cut off line, the lowest score was 3 points below the cut off line. The average gain was 15 I.Q. points.

The plaintiffs charged that the testing procedures utilized for placement were prejudicial in that 1) the tests place heavy emphasis on verbal skills requiring facility with the English language, and 2) the questions are culturally biased and 3) the tests were standardized on white, native-born Americans.

The plaintiffs further pointed out that in "Monterrey County, Spanish surname students constitute about 18-1/2% of the student population, but constitute nearly 1/3 (33-1/3%) of the children in EMR classes."

Studies conducted by the California State Department of Education corroborated the inequity of Mexican-American students in EMR classes. In 1966-67, out of 85,000 children in EMR classes, children with Spanish surnames comprised 26% while they only accounted for 13% of the total school population.

The plaintiffs sought a class action on behalf of all bilingual Mexican-American children then in EMR classes and all such children in danger of inappropriate placement in such classes.

On February 5, 1970, a stipulated agreement order was signed by both parties. The order required that:

1. Children be tested in their primary language. Interpreters may be used when a bilingual examiner is not available.
2. Mexican-American and Chinese children in EMR classes are to be retested and evaluated.
3. Special efforts are to be extended to aid misplaced children readjust to regular classrooms.
4. The state will undertake immediate efforts to develop and standardize an appropriate I.Q. test.

In 1968, a case very similar to Diana was initiated in the Superior Court of Orange County, California on behalf of eleven Mexican-American students between the ages of 5 and 18 (Arreola v. Board of Education, Santa Ana School District, No. 160 577). To date, no ruling has been delivered and it is questionable as to the status of the charges due to the changes occasioned by Diana.

A third case, Covarrubias v. San Diego Unified School District, is also similar in argument to the Diana case except for two distinctions. First, twelve of the seventeen student plaintiffs are black and secondly, the plaintiffs seek $400,000 in punitive damages for the period they spent in EMR classes. The suit was filed with the school district in April, 1970.

The California cases have resulted in several amendments to the California statutes and substantial amendments to the state's regulations. Senate Bill 1317 was the major substantive legislation passed by the California legislature. The Legislative Counsel's digest of the statute is provided below.

> Requires verbal or nonverbal individual intelligence testing of minors in specified primary home language prior to admission to a special education program for the mentally retarded.

Prohibits placement of minor in special education class for the mentally retarded if he scores higher than two standard deviations below the norm on a specified individual intelligence test.

Prohibits placement of minor in special education program for the mentally retarded if, when being tested in a language other than English, he scores higher than two standard deviations below the norm on a nonverbal intelligence test or on nonverbal portion of an individual intelligence test including both verbal and nonverbal portions.

Permits placement of minor in such program if he scores two standard deviations, or more, below the norm on specified individual intelligence tests and after examination by credentialed school psychologist.

Prohibits placement of minor in such class without parents' written consent obtained after complete explanation of special education program.

Requires Department of Education to submit annual report to Legislature on testing and placement of minors in programs for mentally retarded minors.

Provides for termination of act two years following its enactment.

The cases have also had impact at the federal level. On May 25, 1970, an HEW memorandum was sent from J. Stanley Pottinger, Director of HEW's Office for Civil Rights to 1,000 school districts with large numbers of bilingual children. The memo noted that schools would not be in compliance with Title VI of the Civil Rights Act if students whose predominant language is other than English were assigned to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills.

Stewart et al v. Phillips et al (70-1199-F), filed in October, 1970, before the Federal District Court of Massachusetts on behalf of seven black students and parents, takes another major step in the attack on I.Q. testing and EMR placement. As in Diana, the children were tested, adjudged mentally retarded, and placed in Boston EMR classes. Private retesting found the students to be not retarded. Several retesting studies of minority group EMR children in Boston have found 50% to be misclassified. The plaintiffs seek class action to enjoin further testing or placement until a Commission on Individual Needs is appointed to oversee testing and classification. One commission member each

would be named by the State commissioners of education, rehabilitation and mental health; the president of the Massachusetts Psychological Association; the Massachusetts Psychological Center; the Mayor of Boston, and the Chairman of the Boston School Committee. Two members would be parents of children in the schools.

The plaintiffs also seek $20,000 per individual for damages.

2. On the basis of recent finding of large numbers of children misclassified as mentally retarded by school psychologists or other examiners, the question has been raised as to whether such persons may be sued for libel or slander. None of the aforementioned cases have brought such action, and no ruling has yet been given on punitive damages. However, two tangential cases may help to understand this issue.

In Iverson v. Frandsen (237 F. 2d 898, Idaho, 1956), suit was brought by the parents of a nine year old girl against a psychologist at a state hospital for the mentally ill. The child had been taken to the hospital for treatment of fear of enclosed places. Hospital regulations required a psychological examination. A Stanford-Binet test showed the girl to be a "high grade moron." Upon request by the school guidance counselor, the findings were forwarded to school officials.

The U.S. Court of Appeals ruled that "where a psychologist, as a public official, made a professional report on plaintiff's mental level...in good faith, and as representing his best judgement, such report was free from actionable malice and was not libellous."

A case quite different (Kenny v. Gurley, 95 So. 34) in nature does provide helpful thinking regarding libel and misclassification. In Alabama in 1923 a girl was sent home from college after the school doctor had diagnosed her as having venereal disease. A letter was sent by the doctor to the parents explaining her dismissal. Further independent

medical examination disproved the doctor's original diagnosis of venereal disease. Suit was then brought against the doctor for slander. The court ruled that the doctor behaved without malice, that the action of dismissal was justifiable to his responsibility to maintain the health of the general student body and that his letter was privileged communication to a legitimate recipient.

3. Until recently, very little was said in the statutory or regulatory provisions of the states regarding the process of placing a child in a special education program. There does appear to be a trend toward the requirement for admissions committees to review the child's records.

> A placement committee appointed by the local superintendent shall be established for determining the eligibility of exceptional children for placement in special classes. Such a committee should be composed of representation from medicine, education, and psychology, if possible.
>
> This committee, after the study of all data available on each child, shall make recommendations concerning each child's admission to the special class on a trial basis. (Alabama, 1965)

A second trend is for the requirement of parental involvement and/or approval in the placement of a child in an EMR program.

> The determination of the mental handicap of a child shall be made by individual examination conducted by a psychologist with the consent of the parent or guardian of the child. In the event that the parents or guardian of the child disagree with the determination of the psychologist or the placement of the child, they may refer the child to a psychologist of their own choice, and at their own expense, and submit such evaluation to the Board of Education. The Board of Education shall have the ultimate right of placement of children attending the public schools within their jurisdiction. (Colorado statutes 123-22-7(2))

> The Chief Administrative Official of the school district or county or such person as designated by him as responsible for special education shall place the child, except that no child shall be placed or retained in a special education program without the approval of his parent or guardian. (Arizona ARS 15-1013 (e))

The following cases may help clarify some of the considerations to be given in preserving the rights of children in the placement process.

In the 1961 New York case Van Allen v. McCleary (211 NYS 2d 501) the plaintiff sought a court order requiring the board of education to release the school records on his son, particularly the psychological report to a private physician who was treating his son. The court ruled in favor of the plaintiff noting that "the parents' right (to the records) stems from his relationship with the school authorities as a parent who, under compulsory education, has delegated to them the educational authority over his child."

An old but pertinent case is State ex. rel. Kelley v. Ferguson (95 Neb. 63, 144 N.W.1059) in which the Supreme Court of Nebraska in 1914 ruled in favor of the right of a parent to select courses for his child. The plaintiff had for some time instructed his daughter to not attend a required domestic science course provided at a neighboring school one mile away, since such attendance would conflict with her music course. As a result the daughter was expelled from school. The court, in its wisdom, ruled:

> But no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable. There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school. Such pupils are not idle but merely devoting their attention to other branches; and so long as the failure of the students, thus excepted, to study all the branches of the prescribed course does not prejudice the equal rights of other students, there is no cause for complaint.
>
> The state is more and more taking hold of the private affairs of individuals and requiring that they conduct their business affairs honestly and with due regard for the public good. All this is commendable and must receive the sanction of every good citizen. But in this age of agitation, such as

> the world has neven known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.

A 1950 Iowa Supreme Court decision may qualify the principle established in Kelley. The case Petty in re (41 N.W. 2d 672) concerned the refusal of the parents of a deaf child to send their child to a state school for the deaf after evidence was shown that the child could not be educated adequately in a local school. The court ruled against the parent, stating that:

> To obtain an education for a normal child with facilities presented in an average school means one thing, but to obtain an education for a handicapped child, particularly one who is deaf, would mean another thing. A child who has a physical defect necessarily must receive a different type of instruction than one who is not handicapped.

In 1967, the Supreme Court of the United States in In re Gault (887 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527) established that children and their parents are entitled to counsel and to be furnished counsel if they are unable to afford it in matters which could lead to commitment to an institution for delinquency. Madera v. Board of Education of City of New York (267 F. Supp. 356, 386 F. 2d 778) expanded the Gault principle to situations more closely related to the placement of children in special education programs. The child of the plaintiff had been suspended from school. The parents were required to appear before the "superintendent's guidance conference" comprised of various school personnel. The purpose of the meeting was to review alternatives for meeting the educational needs of the child. Among the alternatives considered were reinstatement, placement in a special school for maladjusted children, referral to the Bureau of Child Guidance which would evaluate the child and recommend appropriate placement, and referral to the Bureau of Attendance for court action. The parents were denied the opportunity to be represented by counsel.

The U.S. District Court ruled that the guidance conference could result in a less of personal liberty for the child and that the parents as a result of the "conference" would be in jeopardy of legal proceedings for child neglect. The court concluded:

> that the due process clause of the Fourteenth Amendment to the Federal Constitution is applicable to a District Superintendent's Guidance Conference. More specifically, this court concludes that enforcement by defendants of the 'no attorneys provision'... deprives plaintiffs of their right to a hearing in a state initiated proceeding which puts in jeopardy the minor plaintiff's liberty and right to attend the public schools.

The U.S. Court of Appeals reversed the findings of the lower court noting that the Guidance Conference is a preliminary conference and not an adjudication. The court did note, however, that:

> What due process may require before a child is expelled from public school or is remanded to a custodial school or other institution which restricts his freedom to come and go as he pleases is not before us.

4. The final issue to which an increasing body of legal examination is being given is the placement of children in self-contained special classes limited to children of a single ability classification.

Traditionally, special education meant special classes. This is not so today. There is a distinct movement to encourage other program options such as resource aides to the regular classroom teachers, resource rooms, itinerant services, etc. This trend is not meant to discredit the special class, but rather to view it as a more extreme placement on a continuum of special education services that should be used with caution.

Slowly, this trend is being reflected in changes in state statutes and regulations. One major deterrent to the swing from the special class is the structure of state financial incentive to administrative practices which may be in conflict with appropriate educational practice. The Analytic Study of State Legislation for Handicapped Children (Ackerman and Weintraub, 1971) found that local school districts often use the state funding procedures

as the prime source of planning for the educational needs of handicapped children. This reality is diminishing as more comprehensive legislative authorities are created, however, the situation nationally is far from healthy. A number of recent cases have bearing on this issue.

In 1962 an old woman was taken into custody by police in the District of Columbia after being found wandering about the city in a state of confusion. After psychiatric observation which indicated the woman was suffering from a senile brain disease, the woman was committed to a mental hospital. The psychiatrist noted that the woman was not a threat to the community, only a threat to herself. The woman filed a writ of habeas corpus. The trial court denied her petition (Lake v. Cameron , 364 F. 2d 657). The U.S. Court of Appeals reversed the trial court and in doing so laid down a most important principle

> Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection...
>
> Appellant may not be required to carry the burden of showing the availability of alternatives... (She) does not know and lacks the means to ascertain what alternatives, if any, are available, but the Government knows or has the means of knowing and should therefore assist the court in acquiring such information...

From this ruling, it would seem that when there exists a continuum of treatments varying in degree of deprivation of individual liberty that government can only require that appropirate treatment which is least delimiting to the individual's rights. It is also important to note that the court placed the burden on the government to be familiar and make known the alternative treatments.

In two school desegregation cases, McLaughlin v. Florida (379 U.S. 184, 1964) and Loving v. Virginia (388 U.S. 1, 1967) the Supreme Court established a "yardstick" for determining when a procedure was constitutionally offensive. The high court ruled that racial distinctions, differentiations, and classifications are constitutionally offensive,

unless the state is able to justify them as essential to the accomplishment of an otherwise permissible state policy. As in the Lake case, the court emphasized that when alternatives were available, it would be difficult to justify a practice that limited or discriminated individual liberty.

The most cited case by protagonists of traditional special education programming is Hobson v. Hansen (269 F. Supp. 401) from the U.S. District Court of the District of Columbia in 1967. The case centered around the question whether the "track system" utilized in the Washington, D.C. public schools, which separated children into five ability groupings ( 1. Honors track for gifted students, 2. regular track for college preparation, 3. general track - vocational or commercial program for most students, 4. the special or basic track for those with I.Q.'s below 75,and 5. junior primary track for readiness before first grade) was an illegal discriminating practice. Judge Wright noted that:

> The track system was based on three assumptions.
>
> First, a child's maximum educational potential can and will be accurately ascertained. Second, tracking will enhance the prospects for correcting a child's remediable educational deficiencies. Third, tracking must be flexible so as to provide an individually tailored education for students who cannot be pidgeon-holed in a single curriculum (p. 446)
>
> The track system...translates ability into educational opportunity. When a student is placed in a lower track, in a very real sense his future is being decided for him; the kind of education he gets there shapes his future progress not only in school but in society in general. Certainly, when the school system undertakes this responsibility it incurs the obligation of living up to its promise to the student that placement in a lower track will not simply be a shunting off from the mainstream of education, but rather will be an effective mechanism for bringing the student up to his true potential. (p. 473)
>
> None of this is to suggest either that a student should be sheltered from the truth about his academic deficiencies or that instruction cannot take account of varying levels of ability. It is to say that a system that presumes to tell a student what his ability is and what

> he can successfully learn incurs an obligation to take account of the psychological damage that can come from such an encounter between the student and the school; and to be certain that it is in a position to decide whether the student's deficiencies are true, or only apparent (p. 492)
>
> ...it should be made clear that what is at issue here is not whether defendants are entitled to provide different kinds of students with different kinds of education. Although the equal protection clause, is, of course, concerned with classifications which result in disparity of treatment, not all classifications resulting in disparity are unconstitutional. If classification is reasonably related to the purposes of the governmental activity involved and is rationally carried out, the fact that persons are thereby treated differently does not necessarily offend (p. 511)

As in Diana, Judge Wright emphasized the prejudicial nature of present standardized aptitude tests, which are based on white norms when applied in school systems such as Washington, D. C., with a black student population in excess of 90%.

Judge Wright further noted:

> ...any system of ability grouping which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar (515)

Judge Wright's final remarks reflect the difficulty faced by the court in its decision and portend the possible future nature of such court decisions.

> It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government.

The Hobson v. Hansen decision was appealed in Smuck v. Hobson (FO8 F. 2d 175) in 1969 and upheld on a four to three decision by the U. S. Court of Appeals. The appeal was complex since two new dimensions had been initiated. First, the Congress had established a board of education for the District, elected by the people, and given full responsibility for educational policy. Second, the board had accepted the findings and recommendations of the Passow Report, an independent study of the D. C. schools conducted

by Teachers College, Columbia University. The report provided remedies to many of the discriminatory issues raised in the initial case. The appellants argued that the sweeping ban on the "track system" was no longer necessary. While the majority upheld Judge Wright's decision, lattitude was provided for the board to bring alternative plans before the court for consideration.

Judge Burger (now Chief Justice of the Supreme Court) delivered a dissenting opinion. In his dissent, Judge Burger cited the following comment from the Harvard Law Review:

> (T)he limits upon what the judiciary can accomplish in an active role are an additional reason for circumspection, particularly in an area where the courts can offer no easy solutions.
>
> ...A court applying the Hobson doctrine must necessarily resolve disputed issues of educational policy by determining whether integration by race or class is more desirable; whether compensatory programs should have priority over integration; whether equalization of physical facilities is an efficient means of allocating available resources for the purpose of achieving overall equal opportunity. There is a serious danger that judicial prestige will be committed to ineffective solutions, and that expectations raised by Hobson-like decisions will be disappointed. Furthermore, judicial intervention risks lending unnecessary rigidity to treatment of the social problems involved in foreclosing a more flexible, experimental approach.
>
> The Hobson doctrine can be criticized for its unclear basis in precedent, its potentially enormous scope, and its imposition of responsibilities which may strain the resources and endanger the prestige of the judiciary.

In Swann v. Charlotte-Mecklenburg Board of Education (300 F. Supp. 1358) the U.S. District Court of North Carolina ruled in 1969 that:

> There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustration. It is educational, rather than a legal matter, to say whether this is done with the students all in one classroom or separated into groups.

## Conclusions

As mentioned in the beginning of this paper, law has been the "sword of Damocles" that has forced an unwilling education enterprise to develop a system of educating handicapped children, and it is this same law that is now being used to rectify the injustices in that system. Law is the corrective method of a democratic society when assurances of good conduct have not been forthcoming from citizens groups (Berger, 1967).

There are many who today question whether law can command the behaviors it seeks; if it cannot, then its role as a teacher of the citizenry must be enhanced through every vehicle possible. Perhaps the true value of the Diana case and others will not be measured by increased litigation, but rather by the educational community's implementing strategies to prevent further injustices. I would hope that some of the following points will be given serious consideration.

1. I have long thought that perhaps the best motto for education would be "to each child, in his own way, in his own time." Philosophically, education has long accepted this motto; however, its conscience has gotten lost in administrative realities. And so we took a tool--the intelligence test--overworked it, legalized it, and made it become, against our own warnings, a weapon of discrimination. The recent court decisions must be construed as saying, in a fashion similar to gun control legislation, if you can't control those tools, they will have to be taken away. The court has not banned intelligence testing for the purpose of placement, it has said, clean your own house. In doing so, caution will have to be utilized to assure that children are measured on tests that are consistent with their major language, that reflect their environment and cultural heritage, and that are standardized on similar children.

2. Throughout our history, children have not been considered as citizens, having the basic freedoms granted by the Constitution. Numerous cases in recent years, reaching far beyond the scope of this paper, have granted American youth the rights of American citizenship. One of the most cherished of these rights is the entitlement to due process of law in our interactions with the varying elements of government.

The importance of this right was stressed at the recent White House Conference on Children

> Unfortunately, procedures initially designed to be rehabilitative but not retributive, informed but not abusive, enlightened but not willful, have too frequently become the opposite of their intent. Children have been forced to seek redress from their presumed benefactors. (White House Conference, Forum 22, 1970)

For those of us concerned about the education of handicapped children, the cases relating to due process offer several important guidelines. First, children and their parents are entitled to have access to all finding, reports and evidence that may result in any alteration of the child's normal status in the educational system. Secondly, children and their parents have the right to confront the system with opposing information. Third, at such confrontations, hearings, or meetings, children and their parents are entitled to legal counsel if the hearing may result in adjudication.

3. One of our most important legal rights is privacy and maintenance of our personal dignity. President Nixon in a radio speech in 1968 noted that government must"do more than help a human body survive; it must help a human spirit revive, to take a proud place in the civilization that measures its humanity in terms of every man's dignity." (SRS, 1969)

Often in our zeal, we deny those we are trying to help their humanity. We do not need to go far beyond these cases, our schools or our institutions to see this reality. A review of the major cases on libel or slander has been presented. Very little can be learned from this review, other than professionals are safe in their judgments, whether

they be correct or incorrect, as long as they did not have malice in their heart, nor circulated information beyond appropriate channels. However, I anticipate greater litigation and protective legislation in this regard. Perhaps the best advice to all persons involved with children would be do nothing to a child or about a child that you would not do to your own child.

4. Historically, in cases involving government's infringement on an individual's rights, the individual was guilty until proven innocent. Hopefully, some of the recent cases cited are placing the justification responsibility on the shoulders of government. Despite Hobson v. Hansen the issue is not whether special class placement is right or wrong, but can the government prove that the placement of a child in such a class is commensurate with his needs, and that no less extreme alternative is known.

This concept, elaborated in Lake v. Cameron, may be one of the great milestones in jurisprudence and portend great hope to the millions of children who have been neglected or abused by our governmental systems.

5. But who will speak for the children? Increasingly, throughout our land, the children are beginning to speak for themselves. The question is whether we can listen. The question is whether we as individuals and as organizations can become advocates of the children instead of advocates of our enterprises. Such advocacy will have to be conducted in the marketplaces of our society and in the agencies and organizations we represent.

Finally, it is my hope that in your considerations at this conference you will attend to not only the legal implications of the child who has been abused by the special education system, but also that child in need for whom no access to special education is provided. The Supreme Court of the United States in the landmark 1954 desegregation case Brown et al v. Board of Education of Topeka et al (347 U.S. 5) states:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

I am most pleased to have this opportunity to present these views, at this most important conference. The needs of our people are so great, that to many the issues raised today will seem insignificant, but the battle is never easy. But as Mayor John Lindsay so ably stated:

> No society in the world has higher aspirations for individual freedom than ours. Inevitably, we fall short. Our task--your task and my task--is to make the reality equal to the promise. In peace, under law, we must go Right on.

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